(16,641.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898

No. 144.

DARWIN C. ALLEN, PLAINTIFF IN ERROR,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 6, 1898.

a In the Supreme Court of the State of California.

SOUTHERN PACIFIC RAILROAD CO., Respondent,
vs.
DARWIN C. ALLEN, Appellant. } No. 15714.

Transcript on Appeal.

Rob't Harrison, attorney for appellant.
Jos. D. Redding, attorney for respondent.

Filed this 19th day of April, A. D. 1894.

L. H. BROWN, *Clerk*,
By P. V. LONG,
Deputy Clerk.

1 In the Supreme Court of the State of California.

In the Superior Court of the County of Tulare, State of California.

SOUTHERN PACIFIC RAILROAD CO., Plaintiff,
vs.
DARWIN C. ALLEN, Defendant.

The plaintiff, by Joseph D. Redding, its attorney, complains and alleges:

I.

The plaintiff is and was at all the times herein mentioned, a corporation duly organized and existing under and by the laws of the State of California.

2–15 II.

The plaintiff was on the 1st day of February, 1888, the owner and seized in fee of all of the following-described tracts of land, situate in the county of Tulare, State of California, and known and designated on the public surveys of the United States, as follows, to wit:

* * * * * * *

16 III.

That on the first day of February, 1888, the plaintiff and defendant entered into several contracts, in writing, numbered as follows: Contract No. 9222 to and including contract No. 9305, by
17 which the plaintiff agreed to sell to the defendant the above-described lands and premises.

IV.

That filed with this complaint and made a part hereof and now placed in the custody of the clerk of this court, as exhibits and marked Exhibit "A," in this cause, and to be introduced by the

plaintiff, as evidence in this cause, and to be kept by the clerk in said custody, until the final disposition of this suit, are the duplicate originals of said contracts entered into as aforesaid, duly signed by the parties thereto, namely, the plaintiff and the defendant; that in said contracts will be found each and all of the terms of said contracts specifically set forth.

V.

That on the 1st day of February, 1889, there became due and owing plaintiff, from said defendant, under the terms of said contracts, the sum of one thousand four hundred and forty-seven — ($1,447.73) dollars for the second year's interest on the remainder of the purchase-money.

That said defendant has not paid the same nor any part thereof.

18 That on the 1st day of February, 1890, there became due and owing plaintiff, from said defendant, under the terms of said contracts, the sum of one thousand four hundred and forty-seven and $\frac{73}{100}$ths ($1,447.73) dollars, for the third year's interest on the remainder of the purchase-money.

The said defendant has not paid the same nor any part thereof.

That on the first day of February, 1891, there became due and owing plaintiff, from said defendant, under the terms of said contracts, the sum of one thousand four hundred and forty-seven and $\frac{73}{100}$ths ($1,447.73) dollars, for the fourth year's interest on the remainder of the purchase-money.

That said defendant has not paid the same nor any part thereof.

All of which will more specifically appear by a statement filed with this complaint and marked Exhibit "B," setting forth in detail the amounts due and unpaid, which statement is made a part of this complaint, and is to be used as an exhibit in said cause and to which reference is particularly made.

VI.

That said defendant has not paid said amounts nor any part thereof.

19 VII.

That on the 24th day of June, 1891, the plaintiff demanded payment from said defendant of the said several sums due; that said defendant on or about that day refused to pay the same and still refuses to pay the same. That said defendant entered into possession of said lands and premises and now continues in the possession thereof.

VIII.

That plaintiff is, and always has been, willing and ready to perform said agreements, in all their covenants and conditions, on its part to be kept and performed, upon full performance by defendant of the terms and conditions of said contracts and the said plaintiff has been ready at all times, and now is ready, after the re-

ceipt of the patent for said lands and premises, and upon demand, and the surrender of the several contracts, hereinabove referred to, to execute and deliver to the defendant, his heirs and assigns, grant, bargain and sale deeds of said premises.

Wherefore, plaintiff prays judgment that there is due from said defendant to the plaintiff under and by virtue of said contracts, the sum of four thousand three hundred and forty-three and
20 $\frac{19}{100}$ths ($4,343.19) dollars, the same being for the second, third and fourth years' interests on said contracts. That said defendant perform said agreements and pay to the plaintiff within thirty days from the date of decree herein, the amounts due to the plaintiff upon said contracts.

That in case said defendant fails to pay to plaintiff the amounts found due to plaintiff upon said contracts, as aforesaid, within said period of thirty days, from the entry of decree herein, then and from that time the defendant, and all persons holding said premises under said defendant shall be forever barred and foreclosed of all claim, right or interest in said lands and premises, under and by virtue of said agreements, and be forever barred and foreclosed of all right to a conveyance thereof, and that plaintiff be let into the possession of said premises, and that said contracts be declared null and void.

That plaintiff have such other or further relief as the court may deem just and equitable.

The plaintiff recover its costs herein.

JOSEPH D. REDDING,
Attorney for Plaintiff.

(Duly verified.)

Filed August 6, 1892.

21 *Stipulation.*

(Title of Court and Cause.)

It is hereby stipulated that there be omitted from the transcript on appeal herein, all of Exhibit "A" of plaintiff's complaint, save one, of the contracts in said exhibit contained: all of the eighty-four contracts of said exhibit being of same form and precisely alike, save as to description of the land and price thereof.

JOSEPH D. REDDING,
Attorney for Respondent.
ROB'T HARRISON,
Attorney for Appellant.

San Francisco, March 13, 1894. Filed herewith.

EXHIBIT "A."

(Referred to in foregoing stipulation.)

SOUTHERN PACIFIC RAILROAD COMPANY,
LAND DEPARTMENT.

No. 9297.

This agreement, made at San Francisco, California, this first (1st) day of February, A. D. 1888, between the Southern Pacific Railroad Company, party of the first part, and Darwin C. Allen, of the city and county of San Francisco, State of California, party of the second part;

22 *Witnesseth:* That the party of the first part, in consideration of the covenants and agreements of the party of the second part hereinafter contained, agrees to sell to the party of the second part, the following tract of land situated in the county of Tulare, State of California, and known and designated on the public surveys of the United States as the west half of northeast quarter (W. ½ of N. E. ¼) of section thirty-three (33), township twenty-three (23), south, range nineteen (19) east, Mount Diablo base and meridian, containing eighty (80) acres, for the sum of two hundred and eighty ($280) dollars gold coin of the United States.

And the party of the second part, in consideration of the premises, agrees to buy the land hereinbefore described, and to pay to the party of the first part, the said sum of two hundred and eighty ($280) dollars, as follows, to wit: Fifty-six ($56) dollars, and also $15.68, one year's interest in advance on the remainder, in United States gold coin of the present standard of value, on the execution of this contract (which two last-mentioned sums have this day been fully paid), and the remainder, to wit: the sum of two hundred and twenty-four ($224) dollars, with interest thereon, annually in

23 advance, at the rate of seven per cent. per annum, both in United States gold coin *gold coin* of the present standard of value, at its office in the city and county of San Francisco, on or before the 1st day of February, 1893, and, also, to pay all taxes and assessments that may at any time be levied or imposed upon said premises, or any part thereof; and if the party of the second part shall fail to pay such taxes or assessments, or any part thereof, at any time when the same shall become due, then the said party of the first part may pay the same, and all sums so paid by the party of the first part shall be added to and become part of the unpaid remainder, and shall bear interest at the same rate, and be paid in the same manner and at the same time and place hereinbefore provided for the payment of said remainder and the interest thereon.

It is further agreed, that upon the punctual payment of said purchase-money, interest, taxes and assessments, and the strict and faithful performance by the party of the second part, his legal representatives or assigns, of all the agreements herein contained, the party of the first part will, after the receipt of a patent therefor from

the United States, upon demand and the surrender of this
24 instrument, execute and deliver to the party of the second part, his heirs and assigns, a grant, bargain and sale deed of said premises, reserving all claim of the United States to the same as mineral land.

It is further agreed that until the full payment of said purchase-money, interest, taxes and assessments, no strip or waste shall be made on said premises, and that no wood or growing trees shall be cut thereon, except for necessary fuel for the family of the legal occupant under this contract, and for the erection of buildings or fences on said land, without the previous written consent of the party of the first part.

It is further agreed, that the party of the second part may at once enter upon, take and hold posses-ion of said premises, provided, however, that if the party of the second part shall fail to make any of said payments of remainder or interest, taxes or assessments as herein provided, or shall fail to comply strictly with any of the stipulations of this contract, then this right shall cease, and the party of the first part, its successors or assigns, may, without notice, enter upon, take and hold possession of the said premises with all the improvements thereon.

It is further agreed, between the parties hereto, that the
25 party of the first part claims all the tracts hereinbefore described, as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that, as in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore, nothing in this instrument shall be considered a guarantee, or assurance that that patent or title will be procured; that in case it be finally determined that patent shall not issue to said party of the first part for all, or any of the tracts herein described, it will, upon demand, repay (without interest), to the party of the second part, all moneys that may have been paid to it by him on account of any of such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre, fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that said lands being unpatented, the party of the first part does not guarantee the possession of them to the party of the second part, and will not be responsible to him for damages, or cost, in case of his failure to obtain and keep such possession.

It is further agreed, that if the party of the first part shall
26 obtain patent for part of the lands herein described, and shall fail to obtain patent for the remainder of them, this contract shall, in all its provisions, be and remain in full force and virtue as to the tracts patented, and shall, except as to repayments herein provided for, be null and void as regards those tracts for which its shall be finally determined that patents cannot be obtained.

It is further agreed, that the party of the second part will never deny that the tracts herein described, or any part of them, are a

part of said grant, and will do no act to hinder, delay or impede the obtaining of patent for them by the party of the first part; and that he will not obtain or hold possession of all, or any of them adversely to said party of the first part.

It is further agreed, that this contract shall not be assignable, except by endorsement, and with the written consent of the party of the first part, and the written promise of the assignee to perform all the undertakings and promises of the party of the second part, as above set forth.

It is further agreed, that the party of the second part shall pay $3.00 for the expenses of the acknowledgments to the deed that shall be issued on this contract.

27 In testimony whereof, the party of the first part has caused these presents to be signed in duplicate by its secretary and land agent, and the party of the second part has signed his name hereto.

JEROME MADDEN,
Land Agent S. P. R. R. Co.

J. L. WILLCUT,
Secretary S. P. R. R. Co.

DARWIN C. ALLEN. [SEAL.]

Endorsed: Unpatented lands No. 9297. Contract for a deed.

Answer and Cross-complaint.

(Title of Court and Cause.)

Darwin C. Allen, the defendant above named, answering the complaint of plaintiff in above-entitled action filed, on his information and belief,

I.

Denies that plaintiff, on the first day of February, 1888, or at any other time, was, or is, the owner or seized in fee of the several pieces of land in said complaint described, or of any, or either, or of any part of any or either of them.

28 II.

Defendant denies that he ever entered upon, or took possession, or is now, or ever was in possession of said pieces of land, or of any or either, or of any part of any or either of them.

And by way of cross-complaint, the said defendan*dant* alleges:

I.

That plaintiff is, and at all times herein mentioned, was a corporation as in said complaint alleged.

II.

That defendant entered into certain contracts with plaintiff in paragraph "III" of plaintiff's complaint, and as therein mentioned.

III.

That at the time of entering into said contract, the plaintiff represented to defendant that plaintiff was the owner and seized in fee of all the pieces of land in said complaint and said contracts described under a grant to it by the Congress of the United States, but had not yet received a patent therefor, and that defendant believed said representations and entered into said contracts with plaintiff for the purchase from it of said pieces of land as in said complaint alleged, wholly and solely upon the basis of said represent-ions and his belief of the truth thereof. Had defendant known or believed that said representations were false or untrue, he would not have entered into said contracts nor sought to purchase said lands, or any part of them, from plaintiff.

IV.

That as defendant is informed and believes, the plaintiff, at the time of entering into said contracts as aforesaid, was not the owner or seized in fee of said pieces of land, or of any or either, or of any part of any or either of them, under a grant from said Congress, or otherwise, and had not any right, title, or interest in said pieces of land, or in any or either, or in any part of any or either of them.

V.

That defendant never was given, took, or had possession, use or enjoyment of said lands, or of any part thereof, but was prevented from taking or holding possession of them, or of any part of them, by reason of plaintiff's lack of title to them as aforesaid. That defendant is ready and willing, and hereby offers to surrender to plaintiff all claim, right or interest to or in said lands, and every part thereof, and to surrender all of said contracts and all interest in, and claim to them.

VI.

That at the time of the execution of said contracts, to wit: February 1, 1888, defendant paid plaintiff on account thereof, and as part of the purchase price of said lands in said contracts described, the sum of six thousand six hundred and eighteen and $\frac{25}{100}$ dollars in United States gold coin, no part of which sum has been returned to him.

VI-.

That soon after the execution of said contracts as aforesaid, to wit: in May, 1888, defendant entered into a contract for the sale by him, and the purchase by the vendee, of all of said lands, for the price of fourteen thousand four hundred and eighty-eight dollars in excess of the price paid and to be paid plaintiff by defendant for said lands under the terms of the co-tracts set forth in said complaint, but that the vendee under said contract with defendant, upon the examination of the title to said lands, rescinded his said

contract and refused to purchase said lands, or any part of
31 them, on the ground and for the reason that neither plaintiff nor defendant had any title to, or interest in, said lands, or any part of them. And defendant avers that neither plaintiff nor defendant then had any title to, or interest in, said lands, or any part thereof, and that by reason thereof, and of the false representations of plaintiff as to its title and claim to said lands as aforesaid, the defendant has been injured and damaged, to wit: in (1) the said sum of six thousand six hundred and eighteen and $\frac{25}{100}$ dollars in United States gold coin, with legal interest thereon from February 1, 1888, and (2) the sum of fourteen thousand four hundred and eighty-eight dollars.

Wherefore, defendant joins with plaintiff in praying that said contracts so rescinded, and sought to be rescinded by plaintiff in his said complaint, be declared null and void, and that defendant have judgment against the plaintiff for (1) the moneys paid plaintiff on account of said contracts, namely: the sum of six thousand six hundred and eighteen and $\frac{25}{100}$ dollars in United States gold coin, with interest thereon from February 1, 1888, at the rate of seven per cent. per annum; (2), the damages suffered by defendant by, and on account, of the false representations of plaintiff, as aforesaid, namely, the sum of fourteen thousand four hundred
32 and eighty-eight dollars, and (3) the costs of this action.

ROB'T HARRISON,
Attorney for Defendant.

(Duly verified.)

Filed August 19, 1892.

Answer to Cross-complaint.

(Title of Court and Cause.)

Now comes the plaintiff in the above-entitled action and answers the cross-complaint of the defendant herein and for answer alleges:

The plaintiff denies that at the time of entering into said contracts, that it represented to the defendant that it, the said plaintiff, was the owner and seized in fee of said tract of land or any portion thereof, except as is set forth in and by the terms of the contracts themselves.

The plaintiff denies that at the time of entering into sa-d contracts as aforesaid, it was not the owner or seized in fee of said pieces of land or of any or either of them, or of any part, or of any or either of them under a grant from said Congress or otherwise, but, on the contrary, plaintiff alleges that it was at said time the grantee
33 under the act of Congress of July 27th, 1866, as is set forth in the contracts themselves and made a part of the complaint on file herein and to which reference is particularly made and which are made part of this answer to the cross-complaint of the defendant.

The plaintiff denies that it had not, at said time, or at any time, any right, title or interest in said pieces of land, or of any, or either

of them, or of any part, or of any, or either of them, but, on the contrary, plaintiff alleges that it did have title at said time to each and all of the pieces of said land mentioned in said contract, in pursuance to the terms of said act of Congress, and in accordance with the stipulations contained in said contracts above enumerated.

The plaintiff denies that the defendant never was given, or took, or had possession, or the use, or the enjoyment of said lands, or any part thereof, and denies that the defendant was prevented from taking or holding possession of them, or any part of them, by reason of the defendant's lack of title to them, as aforesaid or in any way. On the contrary, plaintiff alleges that the defendant did take possession of all of said land and premises under the terms of said contracts, and has held possession of the same ever since, and has had possession up to the time of the commencement of this action, and still holds possession.

34 Plaintiff denies that any vendee, or the particular vendee, named by the defendant in his cross-complaint, rescinded any contract with the defendant, or refused to purchase the land and premises mentioned in this action, or any part of them, because the plaintiff had no title to the same.

The plaintiff denies that neither the plaintiff nor the defendant, then, had any title or interest in or to said lands, or any part thereof, and denies that by reason thereof, or by, or from the false representations of the plaintiff as to its title or claim to said lands, as aforesaid, the defendant has been injured or damaged at all, or in the sum of six thousand six hundred and eighteen and $\frac{25}{100}$ths ($6,618.25) dollars, gold coin, with legal interest thereon, from February 1st, 1888, or in sum of fourteen thousand four hundred and eighty-eight ($14,488) dollars, or in any sum whatever; on the contrary, plaintiff alleges that defendant entered into said contracts fully informed and cognizant of all the conditions relating to the title of said lands, and was satisfied of the same, and stipulated upon the same in said contracts.

Wherefore, plaintiff prays judgment that the defendant

35 take nothing by his cross-complaint, and that the plaintiff have judgment according to the prayer of his complaint on file.

JOSEPH D. REDDING,
Attorney for Plaintiff.

(Duly verified.)

Endorsed: Filed Aug. 30, 1892.

Transfer of Action.

(Title of Court and Cause.)

In this action a stipulation by counsel for respective parties consenting to a transfer of the action from this court to the superior court, in and for the city and county of San Francisco, State of California, having been filed, on motion of E. O. Larkins, Esq., repre-

senting the plaintiff herein, it is ordered that this action be transferred to the superior court, in and for the city and county of San Francisco, State of California, for trial.

STATE OF CALIFORNIA, } ss:
County of Tulare, }

I, John G. Knox, county clerk and *ex officio* clerk of the superior court, in and for the county of Tulare, State of California, do hereby certify the foregoing to be a true, full and correct copy of an
36 order duly made and entered in the records of said court, on the 4th day of November, 1892, in said action.

Witness my hand and seal of said court affixed this 4th day of November, 1892.

JOHN J. KNOX, *Clerk,*
By W. F. THOMAS, *Deputy.*

Filed, with all the other papers in the action, in the office of the clerk of the superior court of said city and county of San Francisco, December 8, 1892.

In the Superior Court in and for the City and County of San Francisco, State of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
DARWIN C. ALLEN, Defendant.

Findings of Facts and Conclusions of Law.

On the — day of April, 1893, the above-entitled cause was regularly called for trial, J. D. Redding, Esq., appearing as counsel for said plaintiff, and Robert Harrison, Esq., appearing as counsel for defendant. Whereupon, evidence both oral and docu-
37 mentary was adduced on behalf of *of* the respective parties, and thereafter, after argument of counsel, the cause was submitted to the court for decision.

And the court having fully considered the matter, and being fully advised in the premises, now makes and finds the following its findings of fact and conclusions of law therein.

Findings of Fact.

That on the first day of February, A. D. 1888, the plaintiff and defendant entered into all of the certain several contracts in writing, alleged in the complaint, and annexed thereto as Exhibit "A" and said contracts have not been rescinded, or modified, but are in full force and effect.

II.

That on the 1st day of February, 1889, there became due and owing plaintiff from defendant, under the terms of said contracts,

the sum of one thousand four hundred and forty-seven dollars and seventy-three cents for, and on account, of the second year's interest on the remainder of the purchase-money of the premises described therein and in said complaint.

That on the 1st day of February, 1890, there became due
38 and owing plaintiff from defendant, under the terms of said contracts, the sum of one thousand four hundred and forty-seven dollars and seventy-three cents for, and on account, of the third year's interest on the remainder of the purchase-money of the premises described therein and in said complaint.

That on the 1st day of February, 1891, there became due and owing plaintiff from defendant, under the terms of the said contracts, the sum of one thousand four hundred and forty-seven dollars and seventy-three cents, for, and on account of the fourth year's interest in the remainder of the purchase-money of the premises described therein and in said complaint.

III.

That said sums of money, or any thereof, or any part of any thereof, have not been paid, but the whole thereof remain due and owing by defendant to plaintiff.

IV.

That demand for payment of each of said sums found due as aforesaid, was made upon defendant by plaintiff, prior to the commencement of this action.

39 V.

As to the alleged possession by defendant of the lands in said complaint described, and of all of them, no evidence was introduced herein in support thereof, and the court finds, therefore, that defendant never had actual possession of said lands, or of any part thereof.

VI.

The plaintiff is, and always has been, willing and ready to perform said contracts in all their covenants and conditions on its part to be performed upon full performance by defendant of the covenants and conditions of said contracts upon his part to be performed and fulfilled. That the lands and premises therein described were portions of the public domain of the United States and were granted to plaintiff by an act of the Congress of the United States, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast;" approved July 27, 1866. That all of said lands, save sec. 5, in township 23 south, range 19 east, M. D. M., are situated within a belt more than 20 miles and less than 30 miles from plaintiff's
40 railroad, generally known as the indemnity belt; the said sec. 5 being within 20 miles of said railroad.

That the loss to plaintiff of odd-numbered sections within said

granted limits, *i. e.*, within 20 miles of said railroad, because of the various exceptions and reservations in said act provided for, is fully equal to all the odd-numbered sections within said indemnity belt.

That on March 19, 1867, an order was made by the Secretary of the Interior of the United States withdrawing or purporting to withdraw from sale or settlement under the laws of the United States, all of said lands situated in said indemnity belt; and that on August 15, 1887, another order was made by said Secretary of the Interior, revoking, or purporting to revoke, said first-named order, and restoring said lands to the public domain for the usual sale and settlement thereof. The first said order of withdrawal is set forth in vol. — of "Decisions of the Secretary of the Interior" at p. —, and the said second order in vol. 6 of said "Decisions" at pp. 84–92; and which said orders as so set forth are here referred to, and made a part of this finding. That plaintiff is the owner of said lands in fee under the provisions of said act of Congress; that patents or
41 a patent therefor, have not yet been issued to plaintiff by the Government of the United States; that it has not been finally determined that patents or a patent shall not issue therefor, or for any part thereof, but proceedings are now pending before the proper department of the Government of the United States, instituted by plaintiff to obtain patents or a patent for said lands and premises, and the whole thereof. That plaintiff has not been guilty of any want of ordinary diligence in instituting or prosecuting said proceedings to obtain said patents or patent.

VII.

That no representations were made by plaintiff to defendant which induced him to enter into the said contracts other than, or different from the facts as the same are recited in said contracts, and said facts as therein recited are true.

VIII.

No damage has been suffered by defendant as alleged in his cross-complaint herein.

Conclusions of Law.

And, as conclusions of law from the foregoing facts, the court finds and declares:

42 1. That plaintiff is entitled to a judgment or decree that defendant shall within, six months from and after the entry thereof, pay to plaintiff the whole of said sums due, as aforesaid, aggregating the sum of four thousand three hundred and forty-three dollars and nineteen cents, and if he shall fail to pay the same within the time aforesaid, said defendant and all persons holding said premises, or any part thereof under him, shall then and there, and by said decree, be forever barred and foreclosed of all claim, right or interest of, in, or to the said lands and premises, or any part thereof, and of all right to a conveyance of said lands, or any part thereof, from plaintiff, and of all or any right to purchase the same under the con-

tracts aforesaid, and that plaintiff be let into the possession of said premises, and the whole thereof.

2. That the plaintiff is entitled to recover its costs of this action.

Let a judgment be entered in accordance with these findings.

EUGENE R. GARBER, *Judge.*

Dated October 30th, 1893.

Endorsed: Filed Oct. 30, 1893.

43 *Decree.*

(Title of Court and Cause.)

This cause having been regularly called for trial before the court, J. D. Redding, Esq., appearing as counsel for the plaintiff and Robert Harrison, Esq., appearing as counsel for defendant, and evidence in behalf of each of said parties having been adduced, and the cause submitted to the court for decision, and on the 30th day October, A. D. 1893, the court, being fully advised in the premises, filed its findings of fact and conclusions of law herein, and ordered that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the premises, it is hereby ordered, adjudged, and decreed that defendant Darwin C. Allen pay to the plaintiff Southern Pacific Railroad Company within six months from and after the date hereof the sum of four thousand three hundred and forty-three dollars and nineteen cents in lawful money of the United States of America; and if said defendant shall fail to pay said sum to said plaintiff within the time aforesaid, said defendant, and all persons holding under him, the premises hereinafter described, or any part thereof, upon such default, shall

44 be and hereby are forever barred and foreclosed of all claim, right or interest of, in or to the said lands and premises, or any part thereof, and of all right to a conveyance of said lands or any part thereof from plaintiff, and of all or any right to purchase the same under the contracts alleged in the complaint in this action, and that plaintiff be let into the possession of said premises and the whole thereof.

The lands and premises hereinbefore referred to are situate in the county of Tulare, State of California, and are known, described and designated in the public surveys of the United States as follows, to wit:

(Here follows a description of the lands as in plaintiff's complaint herein.)

It is further ordered, adjudged and decreed that the said plaintiff have and recover of and from the said defendant its costs of this action, amounting to the sum of $—.

J. M. SEAWELL, *Judge.*

San Francisco, November 8th, 1893.

Filed Nov. 9, 1893. Recorded November 10, 1893, in Book 18 of Judgments, at page 629.

45 *Notice of Appeal.*

(Title of Court and Cause.)

Take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the State of California, from the judgment and decree in said action therein given, made and entered in the said superior court, on the 10th day of November, 1893, in favor of the plaintiff in said action, and against said defendant, and from the whole of said judgment and decree.

Yours, &c., ROB'T HARRISON,
Attorney for Defendant.

To the clerk of said superior court and Joseph D. Redding, Esq., attorney for plaintiff.

Dated this 10th day of March, A. D. 1894.

Endorsed: Service and receipt of the within notice of appeal, after filing, is hereby admitted this 10th day of March, 1894. Joseph D. Redding, attorney for plaintiff. Filed March 10th, 1893. M. C. Haley, clerk, by J. M. Sullivan, deputy clerk.

46 *Stipulation.*

(Title of Court and Cause.)

It is hereby stipulated that the foregoing printed transcript is a full and correct copy of the notice of appeal and of the judgment-roll in the therein-named action, save that there is omitted therefrom such exhibits to the complaint as are referred to in the stipulation immediately following that complaint, and that said printed transcript constitutes a full and sufficient transcript on appeal from the judgment and decree therein set forth.

Also that an undertaking on appeal, in due form, has been properly filed herein on behalf of appellant.

JOSEPH D. REDDING,
JOSEPH D. REDDING,
Attorney for Respondent.
ROB'T HARRISON,
Attorney for Appellant.

47 Due service of the within is hereby admitted this 19th day of April, 1894.

JOSEPH D. REDDING,
Attorney for Respondent.

48 Filed April 17, 1896.

In Bank.

SOUTHERN PACIFIC RAILROAD CO., Respondent,
vs.
DARWIN C. ALLEN, Appellant. } No. 15714.

This is an appeal from the judgment upon the judgment-roll.

The action is to compel the payment of moneys alleged to be due under contracts for the purchase of lands, and, in default of payment, to foreclose defendant's rights under the contracts, and for general relief. The action is on more than one contract, but they are alike in terms, and one will serve as a type of all. Plaintiff agreed to sell, and defendant to buy, a certain piece of land. At the date of the contract defendant paid one-fifth of the purchase price and one year's interest upon the unpaid portion, and agreed to pay the same interest annually in advance until the completion of the purchase, or the termination of the contract, together with all taxes and assessments levied upon the land; and to pay the remainder of the purchase price "on or before the 1st day of February, 1893." Defendant is given the right of immediate possession of the land, and upon the performance of all the conditions of his contract is to receive a deed for the land, which deed plaintiff agrees to make upon demand, "after the receipt of a patent therefor from the United States." The contract proceeds: "It is further agreed between the parties hereto, that the party of the first part claims all the tracts hereinbefore described, as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that in consequence of circumstances beyond its control, it sometimes fails to obtain patents for lands that seem to be legally a portion of its said grant, therefore nothing in this instrument shall be considered as a guaranty or assurance that patent or title will be procured; that in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay, without interest, to the party of the second part, all moneys that may have been paid to it by him on account of any such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part, as per schedule on page three hereof; that said lands being unpatented the party of the first part does not guaranty the possession of them to the party of the second part, and will not be responsible to him for damages or cost in case of his failure to obtain and keep such possession."

This action was brought upon default of defendant in paying the second, third and fourth years' installments of interest. It was commenced before the expiration of the five years' limitation for the payment of the balance of the purchase-money, but was brought to trial and decided after the lapse of that period. Defendant, by answer, denied title in plaintiff, and by cross complaint alleged

false representations by plaintiff of its title, injury to himself therefrom, and concluded with an offer of rescission and demand for a return of the moneys paid by him. The findings are in favor of plaintiff, except as to the fact of possession by defendant of the lands described in the complaint, and against the answer and cross-complaint, and the decree requires defendant to pay within six months the amount found due as unpaid interest, or be debarred and foreclosed of all right and interest in and to said lands, and in and under the contracts.

The only question really involved in the case is as to the construction of the contracts sued upon. It is contended by the defendant that he was under no obligation to purchase the land or to pay the remainder of the purchase price, unless the plaintiff should, *within the five years,* obtain a patent for the land; and that, as the plaintiff had failed to obtain a patent within that time, and as the action was not tried until after the expiration of that time, the defendant was entitled to a rescission of the contract. But clearly the contracts will not bear any such construction. The defendant contracted unconditionally to pay the remainder of the purchase price "on or before" a certain day named, and to pay interest annually in advance on the remainder; but the plaintiff contracted to convey to defendant only "upon the receipt of a patent," and was to repay the money only "in case it be *finally determined* that patent shall not issue." The defendant, therefore, was not entitled to terminate the contract or to require a repayment of the moneys paid, until the question of the issue of a patent to the plaintiff should be "finally determined." The findings state that proceedings are now pending in the United States Land Department for the issue of patent to the plaintiff, and that it has not been finally determined that such patent shall not issue. At the time, therefore, at which defendant contracted to pay the balance of the purchase price, plaintiff was not in default, nor was it in default at the time of the trial.

It will thus be seen that, under these contracts, the times fixed for the payment by defendant of the balance of the purchase price and the installments of interest on that balance, might all arrive before the happening of the event upon which plaintiff agreed to convey, or before the happening of the event upon which plaintiff agreed to return the money paid. A certain day was appointed for the payment of the balance of the purchase price, and the interest thereon in advance. But the issuance of the patent to plaintiff, or the final determination that such patent should not issue, were events the time of the occurrence of which was uncertain, and which might take place long after the expiration of the five years. The case is, therefore, strictly within the well-established rule that, "if a day be appointed for payment of money, or a part of it, or for doing any other act, and the day is to happen or *may* happen before the thing which is the consideration of the money, or the act is to be performed, an action may be brought for the money, or for not doing such other act, *before performance;* for it appears that the party relied upon his remedy, and did not intend to make the per-

formance a condition precedent." Donovan *vs.* Judson, 81 Cal., 334; R. R. Co. *vs.* Butler, 50 Cal., 574; Platt *vs.* Gilchrist, 3 Sandf., 125; Loud *vs.* Pomona, etc., Co., 153 U. S., 564, 576; Coleman *vs.* Rowe, 5 Haw., Miss., 460; Couch *vs.* Ingersoll, 2 Pick., 301; Bean *vs.* Atwater, 4 Conn., 10; Edgar *vs.* Boies, 11 S. & R., 450. The whole framework of the contracts shows that both parties understood that the question whether or not patents would issue was one of uncertainty and that it was impossible to know, in advance, when that question would be "finally determined." Defendant, with full knowledge of that fact, contracted to make his payments at all events and within certain specified times; merely reserving the right to a repayment of the money in case the particular title contracted for should fail. Under these circumstances the obtaining of patents could not be a condition precedent to his obligation to make the deferred payments.

The defendant further contends that the contracts were void *ab initio*, for want of mutuality or consideration, or amounted at most to mere offers to purchase on his part. This contention cannot be sustained. Plaintiff claimed title to these lands, but its title had not been perfected by patent. Defendant had the same opportunity as plaintiff of knowing the nature and probable validity of that claim. Under these circumstances plaintiff agreed to convey to defendant when it should obtain a patent, and to permit defendant to enter into possession of the land at once. In consideration of these premises defendant agreed to purchase when a patent should be issued, paid at once one-fifth of the purchase price and one year's interest on the balance, and agreed to pay the remainder (with interest thereon annually in advance) on or before a given date, with the right to a repayment without interest in the event of an ultimate failure to obtain a patent. These promises were strictly mutual, and each constituted a sufficient consideration for the other. Plaintiff by its contract surrendered its right to contract with or sell to any one else, and yielded to defendant the present right to possession which it claimed. These concessions were clearly a detriment to plaintiff, and, in a legal sense, an advantage to defendant; and they, therefore, furnished a consideration for defendant's promise to pay.

Defendant also claims that the bringing of this action was a rescission of the contracts, which entitled him to a return of the money already paid. But since, under the contract, plaintiff was entitled absolutely to receive the money at the times agreed upon, and to have the benefit of its use until the final determination of the question of the issuance of patent, it was entitled to enforce the collection of the money by this action, and in the event of a failure to pay to have defendant foreclosed of his rights under the contracts. Keller *vs.* Lewis, 53 Cal., 118; Fairchild *vs.* Mullan, 90 Cal., 194; Hansbrough *vs.* Peck, 5 Wall., 506. The decree gave the defendant the alternative of paying within six months, or suffering foreclosure; and this was in accordance with equity. It may be, in view of the fact that the action was tried after the expiration of the time for the payment of the last installment of the purchase price, that

the decree should have required the defendant to pay the balance of the principal as well as the unpaid installments of interest; but the error, if any, in that particular is in favor of defendant, and cannot be considered on his appeal.

It follows from these considerations that plaintiff is entitled to the relief granted by the court below, and that the judgment must be affirmed.

It is so ordered.

VAN FLEET, *J.*

We concur:

McFARLAND, *J.*
GAROUTTE, *J.*
HARRISON, *J.*

Dissenting Opinion.

I dissent, under the conviction that the interpretation given to this contract in the opinion rendered by department two is proper and sound. It was there said (S. P. Co. *vs.* Allen, 40 Pac. Rep., 752): "Plaintiff agreed to sell, and defendant to buy, a certain piece of land. At the date of the contract defendant paid one-fifth of the purchase price and one year's interest upon the unpaid portion, and agreed to pay the same interest annually in advance until the completion of the purchase or the termination of the contract. The time of payment for the unpaid part of the purchase price was 'on or before the first day of February, 1893;' that is to say, within five years from the execution of the contract. Upon performance by defendant of the conditions of his contract he was entitled: First, to take and hold possession of the land; and, second, to receive a deed for the same upon demand, and after payment of the remaining four-fifths of the purchase price, which deed plaintiff agreed to make 'after the receipt of a patent therefor from the United States.' The contract proceeds: 'It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that, in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore nothing in this instrument shall be considered a guaranty or assurance that that patent or title will be procured; that, in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay, without interest, to the party of the second part all moneys that may have been paid to it by him on account of any such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that, said lands being unpatented, the party of the first part does not guaranty the possession of them to the party of the second part, and will not be

responsible to him for damages or cost in case of his failure to obtain and keep such possession.' * * * Under such circumstances defendant agreed to buy and pay for these lands at any time within five years, should plaintiff's claim ripen into a perfect title by the issuance of a patent. Plaintiff agreed, as the consideration flowing from it—first, to convey to defendant, and thus to forego its right to contract with or sell to any one else; second, to yield to the defendant in the meantime such possession, use,
49 and enjoyment of the lands as would otherwise belong to it. Defendant, to secure these advantages to himself, paid one-fifth of the purchase price, and agreed to pay interest upon the remainder of it. If, at any time within five years, plaintiff's title was perfected, defendant had the right upon payment to compel a conveyance of it to himself. If, at the expiration of five years, the result had not been reached, defendant was entitled to repayment of his moneys, without interest, while plaintiff, for foregoing its right to make other contracts, and for yielding to defendant its right to the occupancy and enjoyment of the lands, was to be compensated by the use, without payment of interest, of the defendant's moneys held by it. It is true these terms are not explicitly declared in the contract, as here set forth, but they fairly state the expressed agreement of the parties."

There is no doubt but that in a contract for the sale of land the covenant to convey and the covenant to pay may be made independent, but there is likewise no doubt but that the general rules of interpretation require these covenants to be construed as interdependent unless the contrary is made clearly to appear upon the face of the contract, and where doubt arises as to the intent of the parties that doubt should be resolved by a construction holding them to be interdependent first, as expressing the meaning most probably intended by the parties, and, second, as being the interpretation consonant with the spirit of equity and fair dealing. The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return.

In Hill *vs.* Grigsby, 35 Cal., 656, this court said: "It is very correctly said in Bank of Columbia *vs.* Hagner, 1 Pet., 455, that 'in contracts of this description the undertakings of the respective parties are always considered dependent unless a contrary intention clearly appears;' and the reason assigned, as well as the rule, would be applicable here were the words of the covenant of doubtful import. 'A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the purchase-money enforced upon him, and yet be disabled from procuring the property for which he paid it.' The authorities in support of these principles are very numerous, and there is a greater degree of uniformity among them than is usual on a question presented, as this has been, in so many different aspects."

A man purchases real property for purposes of improvement and permanent ownership, or for barter and sale. He may, and frequently does, pay the purchase-money in speculation, whether or

not the title he receives shall prove a good title, but he at least buys something. No case has been called to our attention, and none is cited in the prevailing opinion, in which he pays the purchase price upon a speculation as to whether the vendor shall give him something or nothing. For it will be noted that the plaintiff does not agree at any fixed time, or at all, to convey to defendant such title as it has or may then have, but merely to convey to it its title when perfected by the issuance of a patent. If it obtains no patent it conveys nothing. In all the cases which are cited, and in which the question of land sales is considered, it was some interest in land, or claim of title, which the vendee was purchasing, and which he agreed to pay for in advance. Here it is quite otherwise, and it may be instructive to see just what effects must logically follow the interpretation given by the prevailing opinion: Allen at the end of five years has paid the full purchase price for the land, with interest. He has been permitted to take possession of it, but has not been secured or warranted even in that. He has no title to the land whatsoever. He cannot compel a conveyance to him of the company's claim or interest in the land. There is no definite future time fixed upon the arrival of which he may recover either his money or the land. He has parted with his money and the use of it for ten, twenty, thirty or fifty years—until it "shall be finally determined that a patent is not to issue." Meanwhile he has no interest to sell, so that it is impossible for him to retrieve himself. He dare not improve the land, because he is not secured in possession or improvements, and he cannot even sell or assign his rights under the contract itself, for that is forbidden by its terms. At the end of an undetermined time, if plaintiff, who is called upon to use only ordinary diligence, fails to obtain a patent, defendant receives nothing but the principal of the purchase price. If that time covered a number of years, as it well might, the use of the money of which defendant was deprived, and which plaintiff has gained, would equal or exceed the principal itself, and yet for this loss defendant receives nothing. It is not easy to believe that a sane man would so contract, and if this be the true interpretation the contract is one without parallel. Upon the other hand, it may be readily gathered from the contract itself that the parties assumed that the question of the issuance of the patent would be determined within five years, and that if determined by or within that time the corresponding rights and liabilities of the parties to it would attach. If not then determined the transaction should be at an end, and plaintiff would have had the use of the full purchase price (or its equivalent in interest) for its agreement to sell to defendant and to yield him possession, while for these considerations defendant would have paid this money with the right to the return of the principal sum at the end of five years—a time long enough in which to bring the contract to an end in one or another way.

The lapse of five years without issuance of a patent is intended to be, so far as the rights of the parties to this contract are concerned, in and of itself a final determination that the patent is not to issue.

So construed the covenants are clearly dependent.

The one interpretation manifestly exposes the defendant to such untoward danger and loss that it is inconceivable that a man of ordinary intelligence would have bound himself by it; the other expresses a fair business contract, such as any two individuals might enter into.

In the prevailing opinion it is said that the contract clearly will not bear the latter construction. That it is the equitable construction is not and cannot be questioned. Upon the other hand, there should be the clearest and most satisfying language in the contract to warrant the interpretation given it. That language I am unable to find, and if there be an existing doubt, under all the authorities and under the law of this court above quoted, the doubt should be resolved against the contention that the covenants are independent.

HENSHAW, *J.*
TEMPLE, *J.*

In Bank.

SOUTHERN PACIFIC R. R. CO. *vs.* DARWIN C. ALLEN. } No. 15714.

I dissent, but upon a different ground from that stated by Justice Henshaw. As to the construction of the contract I concur in the views of the majority, but I do not think that the breach of this particular kind of a contract of sale gives the vendor the right to go into equity to claim specific performance or to foreclose the right of the purchaser. In ordinary contracts for the sale of land the vendor has the right either to rescind or to foreclose for failure of the vendee to make deferred payments, because in ordinary contracts of sale the vendor is able to perform the contract on his part by making a conveyance. But when, as in this case, the vendor is not ready to convey, and may never be able to do so, I think he should be limited to rescission or to his action to recover the installments due, and that he has no right to claim the relief awarded by this judgment.

BEATTY, *C. J.*

50 Filed June 6, 1895.

Department Two.

SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff and Respondent, *vs.* DARWIN C. ALLEN, Defendant and Appellant. } No. 15714.

Appeal from the judgment.

The action is to compel the payment of moneys alleged to be due under contracts for the purchase of lands, and, in default of payment, to foreclose defendant's rights under the contracts, and for general relief. The contracts are many, but they are alike in terms,

and one will serve as a type of all. Plaintiff agreed to sell, and defendant to buy, a certain piece of land. At the date of the contract, defendant paid one-fifth of the purchase price, and one year's interest upon the unpaid portion, and agreed to pay the same interest annually in advance until the completion of the purchase, or the termination of the contract. The time of payment for the unpaid part of the purchase price was "on or before the 1st day of February, 1893;" that is to say, within five years from the execution of the contract. Upon performance by defendant of the conditions of his contract he was entitled—first, to take and hold possession of the land; and, second, to receive a deed for the same, upon demand, and after payment of the remaining four-fifths of the purchase price, which deed plaintiff agreed to make "after the receipt of a patent therefor from the United States." The contract proceeds: "It is further agreed between the parties hereto that the party of the first part claims all the tracts hereinbefore described, as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will use ordinary diligence to procure patents for them; that, in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore nothing in this instrument shall be considered a guaranty or assurance that that patent or title will be procured; that, in case it be finally determined that patent shall not issue to said party of the first part for all or any of the tracts herein described, it will, upon demand, repay, without interest, to the party of the second part, all moneys that may have been paid to it by him on account of any such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that said lands being unpatented, the party of the first part does not guaranty the possession of them to the party of the second part, and will not be responsible to him for damages or cost in case of his failure to obtain and keep such possession." This action was brought upon default of defendant in paying the second, third, and fourth years' installments of interest. It was commenced before the expiration of the five years' limitation, but was brought to trial and decided after the lapse of that period. Defendant, by answer, denied title in plaintiff, and, by cross-complaint, alleged false representations by plainsiff of its title, injury to himself therefrom, and concluded with an offer of rescission, and demand for a return of the moneys paid by him. The findings are against the answer and cross-complaint, and the decree requires defendant to pay within six months the amount found due as unpaid interest, or be debarred and foreclosed of all right and interest in and to the lands, and in and under the contracts.

The court found plaintiff to be the owner, in fee, of the lands, and much nice argument is advanced for and against the finding. But, under our interpretation of the contract, it is a matter irrelevant. Plaintiff was to convey, not the title it had, nor the title in fee found by a court, but the title evidenced by and under the patent of the

United States, and defendant was not to be called upon to consummate the purchase until this muniment of title had issued. The contracts were not void *ab initio* for lack of mutuality or consideration. The averments of false representations as to title having been negatived by the findings, the transaction between the parties amounted to this: Plaintiff claimed title to Government lands, which claim had not been perfected by the issuance of a patent. The sources of knowledge as to the nature and probable validity of the claim were open to defendant, and he did not, therefore, contract blindly. Under such circumstances, defendant agreed to buy these lands at any time within five years, should defendant's claim ripen into a perfect title by the issuance of a patent. Plaintiff agreed, as the consideration flowing from it—first, to convey to defendant, and thus to forego its right to contract with or sell to any one else; second, to yield in the meantime to defendant such possession, use, and enjoyment of the lands as would otherwise belong to it. Defendant, to secure these advantages to himself, paid one-fifth of the purchase price, and agreed to pay interest upon the remainder of it. If, at any time within five years, plaintiff's title was perfected, defendant had the right to compel a conveyance of it to himself. If, at the expiration of five years, the result had not been reached, defendant was entitled to repayment of his moneys, without interest, while plaintiff, for foregoing its right to make other contracts, and for yielding to defendant its right to the occupancy and enjoyment of the lands, was to be compensated by the use, without payment of interest, of the defendant's moneys held by it. It is true, these terms are not explicity declared in the contract, as here set forth, but they fairly state the expressed agreement of the parties. Plaintiff, then, being entitled to the use of the moneys annually to be paid as interest, could enforce the collection of them by this action, after persistent refusal to pay, or have defendant foreclosed of his rights under the contract, for violation of its conditions. Keller *v.* Lewis, 53 Cal., 118; Fairchild *v.* Mullan, 90 Cal., 194; 27 Pac., 201; Hansbrough *v.* Peck, 5 Wall., 506. Plaintiff is not asking a rescission. To the contrary, it is demanding that defendant be compelled to perform the conditions of his contract, and that upon his refusal to do so the rights of the parties under the contract be determined in accordance with equity. Hansbrough *v.* Peck, *supra*. The decree gave the defendant the alternative of paying within six months, or suffering foreclosure. It is urged against it that, since the five years had expired, and plaintiff had not obtained a patent, to compel defendant to pay the delinquent interest would be the requirement of a vain thing, since defendant would be entitled to its immediate return, and that, therefore, the court should not have so decreed, but, to the contrary, should have ordered repaid by plaintiff the moneys of defendant in its hands. The pleadings sufficiently disclose the dates, by which it appeared that the action was tried and determined after the time limited by the contract for its completion. Plaintiff, having failed to secure its patent within that time, was entitled, as has been said—first, to the use of the one-fifth part of the purchase price without payment of interest

therefor; and, second, in like manner, to the use of the annual installments of interest as they fell due. Though the decree of the court would have been consonant with equity, had it been rendered before the five years had expired, it failed to do complete justice under the changed situation brought about by the lapse of that time. While a decree in equity generally operates upon the parties and subject-matter as they stood at the commencement of the proceedings, it only does so to subserve the ends of justice. When, as here, a radical change in the status has been brought about by the passing of time, under the very terms of the agreement, and knowledge of this change is, as here, judicially before the court, or is brought in by appropriate pleading, its decree should be addressed to the rights existing, not at the commencement, but at the time of the determination, of the action. The court should therefore decree to plaintiff, in lieu of the use of the interest payments of which it was deprived by the default of defendant, 7 per cent. interest upon each of these amounts from the date upon which they, respectively, fell due, until the date of the decree; should decree the return by plaintiff to defendant of any excess of the moneys of defendant in its hands over the amount found due, or render a judgment in favor of plaintiff for any deficiency, and, upon a compliance with this judgment, terminate the contractual relations of the parties, as provided by their agreement. Let the judgment and decree be modified accordingly.

HENSHAW, *J.*

We concur.
TEMPLE, *J.*
McFARLAND, *J.*

51 Supreme Court of the United States, of October Term, A. D. 1896.

DARWIN C. ALLEN, Plaintiff in Error,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY, Defendant in Error.

Afterwards, to wit, on the first Monday of August (A. D. 1897), in this term, before the justices of the Supreme Court of the United States of America, at the Capitol, in the city of Washington, in the District of Columbia, comes the plaintiff in error, Darwin C. Allen, by his attorney, Edward R. Taylor, and says that in the record and proceedings aforesaid, namely, the judgment and decree of the supreme court of the State of California in that suit or action therein entitled "Southern Pacific Railroad Company, respondent, *vs.* Darwin C. Allen, appellant," there is manifest error, especially in this, to wit:

First. The said judgment and decree erred in that it did not and does not order or require, as a necessary condition to the annullment or foreclosure of the contracts and of the rights therein and thereunder of said Darwin C. Allen by said judgment and decree

annulled and foreclosed, the repayment and return by said
52 Southern Pacific Railroad Company to said Darwin C. Allen of the sum of six thousand six hundred and eighteen and $\frac{23}{100}$ dollars by him paid to said Southern Pacific Railroad Company on account and under the terms of said contracts so thereafter annulled as aforesaid, together with interest, at the California statutory rate of seven per cent. per annum, from February 1, 1888, the date of said payment.

Second. The said judgment and decree erred in that it did not and does not order or require the repayment and return by said Southern Pacific Railroad Company to said Darwin C. Allen of said sum of $6,618.23, so paid as aforesaid, together with interest thereon at the rate aforesaid from February 1, 1893, the date of the expiration and annullment of said contracts by their own terms.

Third. The said judgment and decree erred in that it did not and does not order or require the repayment and return by said Southern Pacific Railroad Company to said Darwin C. Allen of all moneys by him paid to said company on account and under the terms of said contracts, less the amount of interest at said statutory rate on all moneys by said Darwin C. Allen to be paid to said company, under the requirements of said contracts, prior to the expiration and annullment of said contracts by their own terms.

Fourth. The said judgment and decree erred in that it did not and does not adjudge or declare the said contracts null and void for lack of consideration, and thereupon order and decree the return by said Southern Pacific Railroad Company to said Darwin C. Allen of all moneys paid by him to said company on account of said contracts, together with interest thereon at the rate aforesaid from the date of their payment.

Fifth. The said judgment and decree erred in that it did
53 not and does not adjudge or declare the said contracts and all the obligations thereof to have, under their own terms, ceased and expired with the first day of February, 1893, and thereupon order repaid to said Allen by said Southern Pacific Railroad Company all moneys paid said company by said Allen under and on account of said contracts, together with interest at the rate aforesaid from February 1, 1893.

Sixth. The said judgment and decree erred in that it did not and does not formally rescind the said contracts nor declare them to have been rescinded by the parties thereto, and thereupon order repaid to said Allen by said Southern Pacific Railroad Company all moneys by it received from him under or on account of said contracts, with interest thereon at the rate aforesaid from the date of such rescission.

Seventh. The said judgment and decree erred in declaring that under the terms of said contracts or otherwise there became or was at any time or times due from said Allen to said Southern Pacific Railroad Company any money or sum or sums of money whatever.

Eighth. The said judgment and decree erred in declaring that said Southern Pacific Railroad Company was or ever had been

willing and ready to perform said contracts in all their covenants and conditions on its part to be performed, and especially in declaring and holding that said Southern Pacific Railroad Company was ever ready or able to convey to said Allen the lands in said contracts described and agreed to be by it conveyed to said Allen.

Ninth. The said judgment and decree erred in declaring and holding that said Southern Pacific Railroad Company was at any time possessed of said lands or of the title to or of any con-
54 veyable or contractual interest in them.

Tenth. The said judgment and decree erred in finding and declaring "that it has not been finally determined that patents or a patent shall not issue" for said lands or "or for any part thereof."

Eleventh. The said judgment and decree erred in finding and holding that said Southern Pacific Railroad Company "has not been guilty of any want of ordinary diligence in instituting or prosecuting proceedings to obtain said patent or patents."

And the said Darwin C. Allen prays that the judgment and decree aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of said judgment and decree.

EDWARD R. TAYLOR,
Attorney for Plaintiff in Error.

55 [Endorsed:] 15714. Supreme Court of the United States. Darwin C. Allen, plaintiff in error, *vs.* Southern Pacific Railroad Company, defendant in error. Assignment of errors.

56 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the supreme court of the State of California, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court, before you (being the highest court in the State of California in which a decision thereof could be had), between The Southern Pacific Railroad Company, as respondent therein, and Darwin C. Allen, as appellant therein, wherein there was drawn in question, necessarily involved and passed upon, the validity of a statute of and of an authority exercised under the United States, and a right, title, privilege, and immunity specially claimed by said Darwin C. Allen under said statute and also under said authority, and wherein it was decided that the said statute and authority and said claim of right, title, privilege, and immunity thereunder were each and all invalid, a manifest hath happened, to the great damage of the said Darwin C. Allen, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby command, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the

same at Washington, in the District of Columbia, on the first Monday in August next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what or right and according to the law and custom
57 of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of Supreme Court of the United States, this 7th day of June, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

Seal U. S. Circuit Court, Northern Dist. Cal.

W. J. COSTIGAN,
Clerk of U. S. Circuit Court, N. Dist. of Cala.

The above writ of error is hereby allowed.
W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

58 [Endorsed:] Supreme Court of the United States. Darwin C. Allen, plaintiff in error, *vs.* Southern Pacific Railroad Company, defendant in error. Writ of error.

Service of the within writ of error on June 8, 1897, is hereby acknowledged.

59 UNITED STATES OF AMERICA, *ss:*

To Southern Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the second day of August, A. D. 1897, pursuant to a writ of error addressed to the supreme court of the State of California by the Supreme Court of the United States and filed in the office of the clerk of said supreme court of the State of California, wherein Darwin C. Allen is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and decree in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of June, A. D. 1897, and of the Independence of the United States the one hundred and twenty-first.

Seal Supreme Court of California.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

60 [Endorsed:] 15714. In the Supreme Court of the United States. Darwin C. Allen, plaintiff in error, *vs.* Southern Pa-

cific Railroad Company, defendant in error. Citation. Filed —— —, 189–. —— ——, clerk U. S. circuit court, northern district of California.

Service of within citation by copy admitted this 8th day of June, A. D. 1897, reserving all legal objections.

WM. F. HERRIN,
Attorney for Defendant in Error.

61 In the Supreme Court of the State of California. In Bank.

SOUTHERN PACIFIC RAILROAD CO., Respondent,
vs.
DARWIN C. ALLEN, Appellant. } No. 15714.

On appeal from the superior court in and for the city and county of San Francisco.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Van Fleet, J. We concur: McFarland, J., Garoutte, J., Harrison, J. Dissenting opinion: Henshaw, J., Temple, J. I dissent: Beatty, C. J.

Whereupon it is adjudged and decreed by the court that the judgment of the superior court in and for the city and county of San Francisco in the above-entitled cause be, and the same is hereby, affirmed.

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 17th day of April, 1896, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 23 day of July, A. D. 1897.

[Seal Supreme Court of California.]

T. H. WARD, *Clerk*,
By R. A. MARSHALL, *Deputy*.

62 [Endorsed:] No. —. In the supreme court, State of California. Remittitur. —— —— *vs.* —— ——. Clerk's costs, $—. Paid by appellant, $—. Paid by respondent, $—. Total, $—. T. H. Ward, clerk, by —— ——, deputy.

63 Supreme Court of the United States.

DARWIN C. ALLEN, Plaintiff in Error,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY, Defendant in Error.

Know all men by these presents that we, Darwin C. Allen, Robert Harrison, and Thomas Penlington, of San Francisco, California, are held and firmly bound unto Southern Pacific Railroad Company, a

corporation organized and existing under the laws of the State of California, in the sum of three hundred and fifty dollars, to be paid to said Southern Pacific Railroad Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our own seals and dated this 8th day of June, A. D. 1897.

The condition of this bond is such that whereas the above-named Darwin C. Allen hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment and decree rendered in the supreme court of the State of California, entitled therein "Southern Pacific Railroad Company, respondent, *vs.* Darwin C. Allen, appellant:" Now, therefore, if the said Darwin C. Allen shall prosecute his said writ of error to effect and answer all
64 costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

DARWIN C. ALLEN. [SEAL.]
ROB'T HARRISON. [SEAL.]
THOMAS PENLINGTON. [SEAL.]

In the presence of—

——— ———.

UNITED STATES OF AMERICA,
Northern District of California,
City and County of San Francisco, } ss:

Robert Harrison and Thomas Penlington, being each duly sworn, deposes and says, each for himself, that he is a resident and freeholder of the State of California and is worth the sum of three hundred and fifty dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

ROB'T HARRISON.
THOMAS PENLINGTON.

Subscribed and sworn to before me the 8th day of June, 1897.

JAMES M. ELLIS,
[NOTARY'S SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

The above bond is approved.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

65 [Endorsed:] 15714. Allen, pl'ff in error, *vs.* So. Pac. Co., def't in error. Bond for costs. Filed July 6, 1897. T. H. Ward, clerk, by R. A. Marshall, deputy.

66 I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the foregoing papers in the matter of Southern Pacific Company *v.* Darwin C. Allen on a writ

of error to the Supreme Court of the United States, and consisting of pages one to sixty, both inclusive, are true copies of the record in said case, consisting of the transcript on appeal, a copy of the opinion in said case rendered by the supreme court of California, the judgment (remittitur), the assignment of errors, original writ of error, copy of undertaking for costs, and citation, as appears from the records on file in my office.

Witness my hand and the seal of the supreme court of the State of California this 23rd day of July, 1897.

[Seal Supreme Court of California.]

T. H. WARD, *Clerk*,
By R. A. MARSHALL, *Deputy*.

67 Supreme Court of the United States.

DARWIN C. ALLEN, Plaintiff in Error,
vs.
SOUTHERN PACIFIC RAILROAD COMPANY, Defendant in Error.

It is hereby stipulated that there shall be omitted from the printed record in error in above case the description of lands as shown in "transcript on appeal," commencing at folio 5 of and continuing thence to folio 48 of said transcript; and the clerk of this court is hereby authorized and directed to make said omission from the printed record of the case.

WM. F. HERRIN,
Attorney for Defendant in Error.
EDW. R. TAYLOR, (H.)
ROB'T HARRISON,
Attorneys for Plaintiff in Error.

[Endorsed:] Supreme Court of the United States. Darwin C. Allen *vs.* Southern Pacific Railroad Company. Stipulation as to printed record.

68 [Endorsed:] Case No. 16,641. Supreme Court U. S., October term, 1897. Term No., 428. Darwin C. Allen, pl'ff in error, *vs.* The Southern Pacific Railroad Co. Stipulation to omit part of record in printing. Office Supreme Court U. S. Filed Jul-30, 1897. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,641. California supreme court. Term No., 144. Darwin C. Allen, plaintiff in error, *vs.* The Southern Pacific Railroad Company. Filed July 30th, 1897.